ESPL (M) SDN BHD

v.

HARBERT INTERNATIONAL EST SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[CIVIL SUIT NO: S5-22-612-2002]
29 MAY 2003

CIVIL PROCEDURE: *Discovery - Inspection of documents - Setting aside of Norwich Pharmacal order - Whether defendant fell within category of a "mere witness" - Whether application should have been made inter parte - Whether Norwich Pharmacal order should be set aside*

CIVIL PROCEDURE: *Anton Pillar order - Setting aside - Whether there was a strong prima facie case against defendant - Whether Anton Pillar order could be granted in aid of Norwich Pharmacal order - Whether there was clear evidence of risk that defendant would destroy material documents - Whether Anton Pillar order should be set aside*

Henz Construction ('Henz'), a joint venture between four companies (of which the defendant was one), was appointed as the main contractor for the Kuala Lumpur City Centre Project ('KLCC project'). Henz appointed Radio & General Engineering Sdn Bhd ('R&G') to be sub-contractors for electrical and mechanical works, which in turn sub-contracted the plaintiff to do the electrical works. R&G and the plaintiff opened a joint banking account into which all monies and payments received from the main contractor in respect of the electrical and mechanical works would be deposited. The plaintiff, however, brought a complaint against R&G contending that it had not been fully paid for the mechanical works it had carried out in respect of the KLCC project. The plaintiff also alleged that R&G, without the consent of the plaintiff, had unilaterally opened another bank account and had asked Henz to remit all payments in respect of electrical and mechanical works to a new bank account instead of the agreed joint bank account. The plaintiff, believing that the defendant – as a leading partner of Henz – had in its possession most of the documents relating to the electrical and mechanical works concerning the KLCC project, applied *ex parte* for a Norwich Pharmacal order and an Anton Pillar order with the intention of uncovering evidence relating to the identity of the wrongdoers who assisted R&G in divesting monies for the electrical and mechanical works out of the joint bank account. The plaintiff's application was granted resulting in this application by the defendant to have the said orders set aside.

Held:

[1] On the facts, the defendant fell within the category of a "mere witness". The act of the plaintiff in applying to the court for a subpoena of the defendant's general manager in its action against R&G clearly indicated that the plaintiff had regarded the defendant as a mere witness. It would be a *mala fide* act on the part of the plaintiff to subsequently change its mind by no longer regarding the defendant as a "mere witness" through the application of the Norwich Pharmacal order. Furthermore, the application of a Norwich Pharmacal order should have been made *inter parte* instead of *ex parte*, and no valid reasons were given by the plaintiff for making the *ex parte* application. Therefore, the Norwich Pharmacal order should not have been granted. (p 871 f-g)

[2] In respect of the Anton Pillar order, on the facts, the plaintiff had failed to show the existence of a strong *prima facie* case against the defendant. In addition, this Anton Pillar order should not, in law, have been granted in aid of the Norwich Pharmacal order as in this case. Furthermore, there was no evidence whatsoever to show that the defendant had the propensity to destroy or dissipate any material documents or evidence in its possession for the purpose of the trial between the plaintiff and R&G. Hence, the Anton Pillar order should not have been granted. (pp 871 h & 872 a-b)

[Defendant's application allowed.]

Case(s) referred to:

Expanded Metal Manufacturing Pte Ltd & Anor v. Expanded Metal Co Ltd [1995] 1 SLR 673 ***(refd)***

First Malaysia Finance Bhd v. Dato' Mohd Fathi Hj Ahmad [1993] 3 CLJ 329 SC ***(refd)***

Golf Lynx v. Golf Scene Pty Ltd t/a Custom Golf Club Co [1984] 59 ALR 343 ***(dist)***

Tat Sang Sdn Bhd v. Saw & Co [2002] 7 CLJ 370 HC ***(refd)***

Teoh Peng Phe v. Wan & Co [2001] 5 CLJ 222 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 29 r. 1(2B)

For the plaintiff - Cecil Abraham (G Rajasingam, Leonard Yeoh & Brian Cumming); M/s Tay & Partners

For the defendant - Gideon Tan (Syamsuriatina); M/s Gideon Tan Razali Zaini

Reported by Suresh Nathan

JUDGMENT

Azmel Maamor J:

Background Of Case

On 2 August 2002 the plaintiff had obtained, by way of an *ex parte* application (encl. 6) a Norwich Pharmacal Order and an Anton Pillar Order against the defendant (the said orders). The said orders were immediately served on the defendant and executed. As such action was taken by the defendant to apply to have the said orders set aside. It was originally fixed for hearing on 12 August 2002. On a request by the plaintiff to be given time to reply to the defendant's affidavit the hearing of the defendant's application was postponed to 20 August 2002. At this new date of hearing the counsel for the plaintiff complained to the court that the defendant had committed breach of the said orders and intended to take committal proceedings against the defendant and at the same applied for another postponement of this application. The learned judge allowed the postponement. In the meantime the period of 21 days of the said orders had passed by.

Before the defendant's application for setting aside the said orders could be heard two other applications were filed by the plaintiff. Firstly, under encl. 33 the plaintiff sought the court's ruling whether pursuant to O. 29 r. 1(2B) of the Rules of the High Court 1980 the said orders had lapsed. Secondly, under encl. 36A the plaintiff applied for a motion for committal against the defendant for alleged breach of the said orders.

In the light of the application for a committal proceedings the matter was referred to the Managing Judge of the Civil Division, YA Dato' James Foong. After giving his consideration, the learned judge directed that all the three applications be heard before me.

At the time when the case was first fixed for hearing before me, on 15 November 2002, I requested counsels for both parties to give their views as to which particular application should be heard first. After having considered their arguments I decided to hear encl. 16 first, ie, the defendant's application to set aside the said orders. My reasons in arriving at this decision were as follows. Firstly, in terms of time, encl. 16 was the first to have been filed. Secondly, and more importantly, it was my view that in the light of the facts that the said orders were granted *ex parte* and that encl. 36A is an application for committal proceedings against the defendant it would only be fair and appropriate that the legality of the issuance of the said orders be fully tested first. One way of having the said orders fully tested would be to have an *inter*

parte hearing in respect of the said orders for whatever application the applicant seeks. Towards this end the defendant's application under encl. 16 should, in my view, serve such purpose. Once it has been determined that the said orders have been properly and legally granted then only it would be proper and just to proceed with the application for committal proceedings against the defendant. Based on such reasonings I decided to begin by hearing the defendant's application seeking to set aside the said orders under encl. 16.

However, in the course of my conducting the hearing of encl. 16, it was decided at a meeting of the judges of the Civil Division, that the hearing of all matters in respect of this case be re-conducted by the original hearing judge, YA Dato' Abdul Malik bin Ishak. As such the file in respect of this case was transferred back to the learned judge for his further action. YA Dato' Abdul Malik, in his consideration, decided to hear encl. 33 first and held encl. 16 in abeyance. The defendant, being dissatisfied with that ruling of the learned judge lodged an appeal to the Court of Appeal. The matter was immediately heard. The ruling given by the Court of Appeal was that encl. 16 should be immediately heard. As a result of that decision of the Court of Appeal I was directed by the Managing Judge of the Civil Division to continue with the hearing of encl. 16 which I had previously part-heard. It was in the light of such circumstances that I proceeded to continue to hear the application under encl. 16.

Brief Facts Of The Case

I shall now state briefly the facts of the case especially regarding the relationship between the plaintiff and the defendant. The Kuala Lumpur City Centre Project (KLCC Project) was owned by a company called Amalan Kreatif Sdn. Bhd. (the employer). The employer appointed a joint-venture of four companies calling themselves under the name Henz Construction (Henz) as the main contractor to develop and construct the said KLCC Project. The four companies that formed the joint venture (Henz) were:

(i) Harbert-lnternational Est. Sdn. Bhd. (the defendant);

(ii) Espirit Corporation Sdn. Bhd. (Espirit);

(iii) Nam Fatt Bhd. (Nam Fatt); and

(iv) Zaq Construction Sdn. Bhd. (Zaq).

(It would appear from the above that the name "Henz" had been formed by joining the first alphabets of the names of the 4 joint venture companies).

As can be clearly seen, the defendant is one of the four partners of Henz, the main contractor.

As the main contractor, Henz appointed various sub-contractors to deal with various parts of the works for the said KLCC Project. One of the sub-contractors appointed by Henz was Radio and General Engineering Sdn. Bhd. (R&G) to be responsible for carrying out the Electrical and Mechanical works. R&G decided to do the electrical works itself. As for the mechanical works, R&G had sub-sub-contracted such works originally to Econolev Singapore Pte. Ltd. (Econolev). Subsequently, the mechanical works were novated from Econolev to ESPL (M) Sdn. Bhd. (the plaintiff in this case). Technically R&G was the sub-contractor of Henz responsible to the main contractor for the Electrical and Mechanical works. And the plaintiff is the sub-sub-contractor of R&G responsible for doing the mechanical works. In an arrangement between R&G and the plaintiff it was agreed that both of them would open a bank account to be operated jointly by R&G and the plaintiff. It was also agreed that all monies and payments received from the main contractor in respect of the Electrical and Mechanical works would be deposited in the said bank account.

The cause of complaint by the plaintiff against R&G arose from the fact that the plaintiff had not been fully paid for the mechanical works it had carried out in respect of the KLCC Project. The plaintiff also alleged that R&G without the consent of the plaintiff had unilaterally opened another bank account and had asked the main contractor, Henz to remit all payments in respect of Electrical and Mechanical works to the new bank account instead of to the agreed joint bank account. Arising from such complaint the plaintiff had brought civil action against R&G claiming for payments due to the plaintiff from R&G for the mechanical works done. However R&G had also filed a counter-claim against the plaintiff claiming for defective works carried out by the plaintiff. (See Civil Suit No. D8(D4)(S5)-22-620-1999). One of the several interlocutory applications made by the parties arising from the said suit was an application by the plaintiff to issue subpoena against the General Manager of the defendant, Patrick Mitchell, seeking for an order that the defendant produce documents/final accounts relating to the electrical and mechanical works with a view to ascertain the exact amount of monies received by R&G from the main contractor in respect of the electrical and mechanical works. However, the application was rejected by the learned judge on 14 March 2002. An appeal against that decision had been filed by the plaintiff to the Court of Appeal and its decision is still pending.

As explained above, the defendant was a partner of the joint-venture, Henz, who was appointed as the main contractor. There is no suit filed against the main contractor, Henz nor against the defendant, except in respect of this matter. The basis of plaintiff's claim against the defendant can be found in the

plaintiff's generally endorsed writ of summons (encl. 1); merely applying for two reliefs against the defendant, namely a Norwich Pharmacal Order and an Anton Pillar Order. In the writ of summons in encl. 1 there was no claim for damages for breach of any duty that had been committed by the defendant. From the facts and circumstances of this case, there was no evidence of any contractual relationship between the plaintiff and Henz or the defendant. The plaintiff's contractual relationship was only with R&G. However the plaintiff believed that the defendant as the leading partner of Henz was having in its possession most of the documents relating to the electrical and mechanical works concerning the KLCC Project. The application for the Norwich Pharmacal Order and the Anton Pillar Order for a pre-action discovery was intended to uncover evidence relating to the identity of the wrongdoers who assisted/procured R&G in divesting monies for the electrical and mechanical works out of the joint bank account. The plaintiff's *ex parte* application for a Norwich Pharmacal Order and an Anton Pillar Order against the defendant was granted by the court. In the light of the above facts, the defendant applied to have the said orders set aside (encl. 16).

In applying to set aside the said Norwich Pharmacal Order the defendant relied on the following grounds. Firstly, the defendant contended that it was quite unusual for a Norwich Pharmacal Order to be applied *ex parte*. The decided cases seem to indicate that all applications are applied *inter parte*. (See *Teoh Peng Phe v. Wan & Co.* [2001] 5 CLJ 222; *First Malaysia Finance Bhd v. Dato' Mohd. Fathi bin Haji Ahmad* [1993] 3 CLJ 329; and *Tat Sang Sdn. Bhd. v. Saw & Co.* [2002] 7 CLJ 370). The defendant contended that there was no known case where a Norwich Pharmacal Order was ever granted *ex parte*.

Secondly, it was contended by the defendant that where the innocent third party is a "mere witness" then the Norwich Pharmacal principle cannot apply. This principle is stated in the case of *First Malaysia Finance Bhd. v. Dato' Mohd. Fathi bin Haji Ahmad* [1993] 3 CLJ 329. It was argued that the defendant in the present case comes within the category of a "mere witness" and as such the application by the plaintiff for a Norwich Pharmacal Order against the defendant should not have been granted. In support of such contention the defendant referred to the Civil Suit No. D8(D4)(S5)-22-620-1999 in which both the plaintiff and R&G were suing each other. In that suit the plaintiff had made an application to court to subpoena the General Manager of the defendant with a view to produce certain documents in court. However the application was dismissed by the court. The fact that such an application had been made by the plaintiff against the defendant goes to show that the plaintiff had regarded

the defendant as a "mere witness", in its claims against R&G. It was argued by the defendant, that the plaintiff, after having failed to subpoena the defendant asking him to produce documents subsequently decided to apply for the Norwich Phamacal Order to get the defendant to produce the documents was clearly committing an abuse of the process of this court.

In respect of its application to set aside the Anton Pillar Order the defendant gave the following grounds. Firstly, in order to succeed in an application for an Anton Pillar Order, the applicant must satisfy the court that it has a strong *prima facie* case against the defendant ie, there exists a claim of some substance eg, a breach of contract or a breach of undertaking or trust. The *prima facie* case requirement in an Anton Pillar Order refers to the base claim or cause of action a plaintiff has against a defendant. That cause of action must necessarily be much stronger than an equitable claim for discovery that would otherwise be sufficient in an application for a Norwich Pharmacal Order. In this case it was patently clear that the defendant played no part in the diversion of the monies from the said joint bank account to another bank account. From the documents produced it was clear that Henz, not the defendant, was merely acting on the request of R&G. The request for the change of the bank account was made by the Managing Director of R&G. On the plaintiff's assertion that Henz or the defendant did not inform the plaintiff of such change, the defendant replied that there was no contractual obligation for Henz or the defendant to do so. In the absence of such contractual obligation between the plaintiff and Henz, let alone with the defendant, it was improper and unjust for the plaintiff to penalise the defendant for failing to communicate with the plaintiff in respect of the change of the said bank account.

Secondly, the defendant argued that the Anton Pillar Order cannot in law be granted in aid of and/or be supplementary to a Norwich Pharmacal Order even though it is true that an Anton Pillar Order can be supported by a Norwich Pharmacal Order as shown in the *Golf Lynx v. Golf Scene Pty. Ltd, (t/a Custom Golf Club Co.* [1984] 59 ALR 343. According to the brief facts of that case – Golf Scene had infringed the Golf Lynx's registered trademark and passing-off golf clubs under the brand name "Lynx". Golf Lynx sued Golf Scene for breach of their intellectual property rights. An Anton Pillar Order was obtained as an *ex parte* interlocutory order against Golf Scene to preserve from being destroyed evidence which would prove Golf Lynx's strong *prima facie* case of counterfeiting. Subsequently, a Norwich Pharmacal Order was obtained to order Golf Scene to reveal the identities of other parties involved in the counterfeiting of "Lynx" golf clubs. This clearly shows that the Anton Pillar relief was not used "in aid of and/or supplementary to a Norwich

Pharmacal Order". It was clearly done the other way around. Therefore, on the basis of the facts of the instant case, relying only on an equitable claim for discovery it would be most inconceivable that an Anton Pillar Order could ever be granted.

Finally, the defendant contended that since Henz had done no wrong against the plaintiff, the plaintiff could not show any risk that Henz would destroy any documents or evidence. For a grant of an Anton Pillar Order, the plaintiff must show clear evidence that there is a risk of the documents being destroyed. No evidence of risk of such documents would be destroyed had been shown by the plaintiff. In support of that proposition the counsel for the defendant referred to the case of *Expanded Metal Manufacturing Pte. Ltd. & Anor v. Expanded Metal Co. Ltd.* [1995] 1 SLR 673 where the Singapore Court of Appeal ruled:

> The Anton Pillar would however be discharged as the respondents had not shown that there was a grave danger of the appellants destroying evidence for the purpose of the trial and there was no material before the Court from which it could justifiably draw any inference that the appellants had the propensity to destroy or dissipate material evidence. There was, therefore, no ground for the respondent to even apply for the Anton Pillar order.

After having carefully considered the submissions of counsels for both sides in the light of the whole facts and circumstances of this case I was of the view that there were strong merits in the arguments put forward by the counsel for the defendant.

On the facts that had been adduced and the arguments submitted before me, I was satisfied that the defendant comes within the category of a "mere witness". The act of the plaintiff in applying to the court for a subpoena of the General Manager of the defendant in its action against R&G clearly indicates that the plaintiff had regarded the defendant as a mere witness. It would be a *mala fide* act on the part of the plaintiff to subsequently change its mind by no longer regarding the defendant as "a mere witness" through the application of the Nowich Pharmacal Order. I also agreed with the defendant's counsel that the application of a Norwich Pharmacal Order should have been made *inter parte* instead of *ex parte*. No valid reasons were given by the plaintiff for making the *ex parte* application. Based on those reasons the Norwich Pharmacal Order should not have been granted.

In respect of the Anton Pillar Order I agreed fully with all the three grounds put forward by the counsel for the defendant that its application should not have been granted.

And I do not wish to repeat them. Suffice it to state that the plaintiff had failed to show existence of pre-requisite strong *prima facie* case against the defendant. In addition to that this Anton Pillar Order should not in law be granted in aid of the Norwich Pharmacal Order as had been granted in this case. I was also satisfied that there was no material whatsoever to show that there was grave danger of the defendant destroying or dissipating evidence for the purpose of the trial between the plaintiff and R&G. There was no material before the court which could infer that the defendant had the propensity to destroy or dissipate any material evidence in its possession.

In the light of the whole circumstances of this case and for the reasons as I have stated above I arrived at the decision that the defendant's application to set aside the said orders be granted with costs.